84-1845

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No.

In the Supreme Court of the United States

OCTOBER TERM 1984

OLIVE SORENSEN,

Petitioner,

v.

AUBREY A. FITZGERALD, Trustee,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Did the District Court, sitting in bankruptcy with its adjunct Bankruptcy Court and operating under 28 U.S. #1471 of the 1978 Bankruptcy Relief Act have subject matter jurisdiction over an adversary proceeding commenced by a bankruptcy trustee to set aside the transfer of property voidable under 11 U.S.C. 547(b) where at no time did it have any tangible property in its actual or constructive possession?

2. Did the Court of Appeals perform its duty under Article III and was Petitioner, as defendant in an adversary proceeding in bankruptcy denied due process of law under the Fifth Amendment to the Constitution when the Court of Appeals refused to make a "reasoned disposition" of Petitioner's appeal from a judgment of the district court on the question of the district court's subject

matter jurisdiction?

3. Did the Court of Appeals fail in its duty or exceed its jurisdiction under Article III of the Constitution when it refused to order the district court to vacate its judgment and dismiss the proceeding without prejudice upon finding that the "main" part of the case had become moot pending appeal; instead of only dismissing the appeal and denying Petitioner's motion for relief from a void judgment?

NOTE: All parties are set forth in the caption of this case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

OLIVE SORENSEN,

Petitioner,

v.

AUBREY A. FITZGERALD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Olive Sorensen prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit as entered in the above-entitled cause on March 5, 1985; rehearing denied on May 3, 1985.

OPINIONS BELOW

There are no opinions of the Court of Appeals except a MEMORANDUM filed on April 5, 1984 (App. p. C) and an ORDER filed on March 5, 1985 (App. p. B).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered by Order of March 5, 1985 (App. p. B) and petition for rehearing was denied by Order of May 3 1985 (App. p. A). The jurisdiction of this Court is invoked under 28 U.S.C. #1254(1).

CONSTITUTION AND STATUTES INVOLVED

1. Article III, Section 1 reading: "The judicial power of the United States ... is vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
2. The Fifth Amendment of the Constitution reads: "No person shall . . . be deprived of . . . property without due process of law..."
3. 28 U.S.C. #1471 (See App. p. H)
4. Local Rule 21 of the Court of Appeals for the Ninth Circuit reads:

(a) Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court, shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written reasoned disposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall it be designated "Per Curiam'".

(c) Other Dispositions

". . . A disposition that is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

STATEMENT OF THE CASE

In this case Petitioner, Olive Sorensen became a defendant in an adversary proceeding brought by Respondent, Aubrey A. Fitzgerald as a bankruptcy trustee to set aside the preferential transfer of property under 11 U.S.C. 547(b). The property included a $20,000 cash payment which vanished as tangible property by time the bankruptcy petition was filed. The basic question is whether for lack of a tangible res the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. 1471(e) of the 1978 Bankruptcy Relief Act (or under the former Bankruptcy Act) Petitioner, a widow resides in Redmond, Oregon and Respondent Trustee resides nearby in Bend, Oregon.

On June 10, 1982 Evelyn Harvey, daughter of Petitioner, filed (with her husband Vernon) a Chapter 7 bankruptcy

petition in the Oregon Bankruptcy Court.

About three months earlier, in March of 1982, Evelyn Harvey transferred to Petitioner on account of antecedent debts two items of tangible property. One item was an interest in the fishing vessel, RESTLESS II of Newport, Oregon in the form of two preferred vessel mortgages. The other item was $20,000 in cash which was deposited in Petitioner's bank account.

The district court on May 3, 1983 entered two judgments: One declaring void the two vessel mortgages, and the other that Respondent, Trustee "have judgment against defendant, Olive Sorensen, in the amount of $20,000" (App. p. F) Petitioner appealed.

The Court of Appeals filed a Memorandum on April 5, 1984 finding the controversy respecting the vessel mortgages to have become moot pending appeal and finding the $20,000 payment to

be a voidable transfer under 11 U.S.C. 547(b) if payment was made before March 23, 1982. It remanded the case to find the date of payment. (App. p. C)

On remand and upon stipulation of the parties the district court found that the $20,000 was paid by the debtors to Petitioner before March 23, 1982 and "Further, that prior to June 10, 1982 the $20,000 was completely dissipated by Olive Sorensen by her loaning $15,000 to another person on promise to repay at a future date and paying out the remainder on account of her debts." (App. p. E) The district court made no mention nor did it rule upon Petitioner's contention that the district court lacked subject matter jurisdiction because the $20,000 cash payment had vanished as a tangible res. (App. p. D)

Petitioner next petitioned the Court of Appeals for relief from a void judgment

with the Court of Appeals filing its final ORDER on March 5, 1985:

> The District Court having found that payment of the $20,000 was made prior to March 23, 1982, such payment constituted a voidable preference. The appeal is therefore DISMISSED. The petition for relief from judgment is denied." (App. p. B)

On May 3, 1985 the Court of Appeals denied Petitioner's petition for rehearing with a suggestion for rehearing en banc. (App. p. A)

REASONS FOR GRANTING A WRIT

"Give us the grain and throw away the straw"*

No tangible res; no jurisdiction.

It is of critical importance to both bench and bar for this court to make clear that when Congress granted plenary jurisdiction to its new "adjunct" bankruptcy court in 28 U.S.C. #1471, it did not eliminate the necessity for the court to have tangible property in its actual or constructive possession when trying "turnover" proceedings and making "turnover" judgments.

The gravest error of the Court of Appeals was in denying Petitioner's motion for relief from a void judgment and in not vacating the $20,000 money judgment imposed against Petitioner. A bankruptcy court cannot require a person to turnover something which he or she does not have to

*Justice Story: Life and Letters, II p. 83-84

turnover.

The adversary proceeding commenced against Petitioner under 11 U.S.C. 547(b) to set aside voidable transfers of property was clearly a "turnover" proceeding as defined and limited by this Court in Maggio v. Zeitz, Trustee in Bankruptcy, 333 U.S. 56. There, this Court set aside a contempt order and jail term for Maggio, who had disobeyed an order to turn over property which he never had to turn over. This Court had the following to say about "turnover orders" at p. 63:

> "But this procedure is one primarily to get at property rather than to get at a debtor...But it is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement misappropriation or improvident dissipation of assets."

The Court of Appeals must have known and understood Maggio, supra because it held In Re J.S. Mobile Homes, 434 F.2d 1294 (9 Cir. 1970) on the basis of Maggio at page 1295:

> "(1) . . . A turnover proceeding is similar to an action in rem. It is primarily intended to get at property rather than to get at a debtor. As such, it is appropriate only where the specific property in question . . . is in the possession of the respondent."

On the facts, the above case is identical to the case at bar with the exception that "respondent" bank consented to in personam jurisdiction while at bar, Petitioner did not. (App. p. E)

The Court of Appeals again applied the teachings of Maggio in Hollywood National-Bank v. Bumb, 409 F.2d 23, (9 Cir. 1969) where, for want of a tangible res, it held that a trustee could not sue his escrow holder for a money judgment because he had wrongfully paid out the debtor's money to

the wrong person. See, also: In Re BSC Audio, Inc. 721 F.2d 224, (8 Cir. 1983); In Re United Merchants &Mfg. Co., 3 B.R. 286, (Bk. Ct. SDNY, 1980); and In Re Jorges Carpet Mills, Inc., 27 B.R. 333 (Bk. Ct. Tenn. 1983).

The plight of Respondent, Trustee in this case who found himself without a tangible res was colorfully described by the Court of Appeals in Wickle v. Country Life Ins. Co., 423 F.2d 151 (9 Cir. 1970) at page 154:

> "Here, in effect, the trustee is chasing an airplane out of an airport when the plane has already taken off, made its flight and landed elsewhere."

The most that can be said for the Court of Appeals is that it may have been misled by the complicated language in #1471. (App. p. H) In the subsections which precede subsection "(e)" Congress changed the bankruptcy court's jurisdiction from a summary one to a

plenary one and made it concurrent with all other courts. The only exclusive jurisdiction it conferred on the bankruptcy court was in rem jurisdiction over the debtor's property in §1471(e) which reads:

> "(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case."

By focusing on §1471 from the viewpoint of "in personam" versus "in rem" instead of "summary" versus "plenary" jurisdiction, it becomes clear that Congress gave a full and wise jurisdictional package to its new "adjunct" bankruptcy court. With subsection "(e)" giving the bankruptcy court exclusive and pure in rem jurisdiction over property wherever situated, Congress sharpened the previous judicially fashioned "turnover"

proceedings. By giving the bankruptcy court full and concurrent in personam jurisdiction in the preceding subsections "(a)", "(b)" and "(c)" Congress gives the Trustee the right to sue anyone in any court on any chose in action or tort and recover money damages for the debtor's estate. It is axiomatic that one can get at a person through his property but one cannot get at property through a person who does not have possession of the property.

Court of Appeals had duty to make a "Reasoned Disposition"

When the Court of Appeals deliberately avoided making a "reasoned disposition" of this appeal on the sole issue of the subject matter jurisdiction of the court below it strayed so far from its usual and accepted procedures in violation of Article III of the Constitution and its own Local Rule 21 that this Court should exercise its supervisory power and to back on track the Court of Appeals.

We all know that Article III of the Constitution vested "The Judicial Power of the United States...in one Supreme Court, and in such inferior courts as the Congress from time to time ordain and establish." Also, that Congress established the Court of Appeals as an appellate court and gave Petitioner a right to appeal from judgments of the District Court in 28 U.S.C. 1291.

Petitioner's right to appeal places upon the court a duty to decide the appeal. The Court of Appeals recognized its duty in Mack-Tronics Inc. v. Zirpoli, 316 F.2d 820 at 824 (9 Cir. 1963) wherein it cited four decisions of this Court for its holding, starting with Wilcox v. Consolidated Gas Co., 2;2 U.S. 19, 40, 29 S. Ct. 192, 53 L.Ed. 382.

The Court of Appeals defined its own duty in terms of being required to make a "reasoned disposition" of appeals in its Local Rule 21, wherein it provided that its "reasoned disposition" when labeled an "OPINION" was to be publishable and when labeled a "MEMORANDUM" was neither to be published nor cited in any court in the Ninth Circuit. All other "dispositions" were to be labeled an "ORDER". Rule 21 gave the court flexability in the handling of its large case load but in doing so it allowed it

to pick and choose what decisions it would or would not cast into the stream of stare decisis, the backbone to our common law. In no way did Rule 21 justify the Court to avoid making a "reasoned disposition" of the critical point on this appeal by covertly labeling its denial of relief from a void judgment and dismissal of the appeal an "ORDER".

Common sense tells us that a "reasoned disposition" must contain some expression of fact or law as to why the disposition was made no matter whether the reason is only a citation of a case or the mention of something that might be unreasonable.

When the sole issue of law on this appeal gravited to whether or not the court below lacked jurisdiction for want of a tangible res the Court of Appeals cannot be said to have made a "reasoned disposition" by stating in its Memorandum of April 5, 1984 (App. p. C):

> "We remand for a factual finding of the date of the $20,000 payment. If the payment was made after March 23, the case will return to this panel to resolve the legal issues surrounding the scope and interpretation of 11 U.S.C. #547. If the payment was made before March 23, it is a voidable preference."

REMANDED

Or in its order after remand, filed March 5, 1985 (App. p. B):

> "The district court having found that payment of the $20,000 was made prior to March 23, 1982, such payment constituted a voidable preference. The appeal is therefore DISMISSED. The petition for relief from judgment is denied."

It may be excusable for the court not to have ruled on Petitioner's belated challenge to jurisdiction in its Memorandum of April 5, 1984 but it is inexcusable for the Court not to have given any reason for denying Petitioner's petition for relief from a void judgment on March 5, 1985.

This case presents a rare opportunity

for this court to define the limits to the Court of Appeals use of its Local Rule 21. When Petitioner asked for relief from a void judgment pursuant to F.R.C.P. 12(h)(3) she also asked for a "reasoned disposition, preferably by our Opinion".

If there is such a thing as a "sacred cow" in our federal court system it must be that of subject matter jurisdiction, as every court at all levels must constantly examine sua sponte its own jurisdiction and that of the court below. Mitchel v. Maurer, 293 U.S. 237. For this special reason in this case it should be held that it was mandatory for the Court of Appeals to make a "reasoned disposition" on this issue. The Court knew it had no discretion. The Kanto Maru, 112 F.2d 564. (9 Cir. 1940). How else can the parties or the public know if the Court is doing its honor bound duty?

Mootness requires dismissal of the proceeding in court below

In this case Respondent in his original complaint sought to have set aside two vessel mortgages. By amended complaint he asked for the same relief for an additional property item of $20,000. The trial court entered separate judgments for setting aside both items of property under 11 U.S.C. 547(b).

When the Court of Appeals found the controversy moot to what it regarded as "the main issue on appeal" it was precluded from going any further into the merits of the controversy. Socialist Labor Party v. Gilligan, Gov. of Ohio, 406 U.S. 583, 589, 92 S. Ct. 1716, 1720, 32 L.Ed2d 315, (1971); H.K. Porter Co. Inc. v. Metropolia Dude Ctg. 650 F.2d 778, 782, (5 Cir. 1981).

The Court of Appeals knew full well that it had the duty to order the district

court to dismiss the adversary proceeding in the district court without prejudice and to vacate any judgments entered therein as it was reminded on petition for rehearing that the Court had gone en banc to decide just that in Sawyer v. Pioneer Mill Co., 300 F.2d 200, (9 Cir. 1962).

The dismissal of the appeal in this case cannot serve as a dismissal of the action in the court below. Which is so essential to Petitioner. United Sates v. Munsingwear Inc., 340 U.S. 36 (1950). Article III compels dismissal of all controversies that have become moot. A controversy founded on a single complaint cannot become only partly moot. Petitioner has been deprived of her procedural rights without due process of law as guaranteed by the Fifth Amemdmant to the Constitution.

CONCLUSION

It is both timely and important for this court to make clear that when Congress enacted 28 U.S.C. 1471(e) as a part of the 1978 Bankruptcy Relief Act it gave the new "adjunct" bankruptcy court an exclusive and pure in rem jurisdiction over the debtors property which is to be strictly confined to tangible property within the court's actual or constructive possession.

Furthermore, when the Court of Appeals deliberately shirked its duty by not making a "reasoned disposition" of Petitioner's appeal it violated both Article III of the Constitution and its own Local Rule 21.

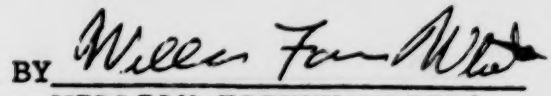
Petitioner is being denied due process of law under the Fifth Amendment and is suffering a dire hardship unless or until this Court directs that the judgment of the district court be vacated and the

adversary proceeding therein be dismissed without prejudice.

Finally this case is by no means moot. Respondent, Trustee has taken his $20,000 judgment over to Bend, Oregon where he has been vigorously pressing a creditors bill in the Circuit Court of Oregon to wipe out the equity which Olive Sorensen, a 69 year old widow, has in her home and ranch. More important, the Oregon Circuit Court has been looking for guidance from the Court of Appeals in form of a reasoned disposition of the issue on the federal court jurisdiction. It is both unfair and unwise for the Oregon courts to be required to decide this federal question just because the Court of Appeals abdicates.

Please grant a writ directed to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BY 

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUBREY A. FITZGERALD,) FILED MAY 3, 1985
Plaintiff-Appellee,) CA No. 83-4020
v.) DC No. CV 82-799-RE
OLIVE SORENSEN,) BKCY No. 382-01818
Defendant-Appellant.) ORDER

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUBREY A. FITZGERALD, Plaintiff-Appellee,	FILED MARCH 5, 1985
v.	CA No. 83-4020
OLIVE SORENSEN, Defendant-Appellant.	DC No. CV 82-799-RE
	BKCY No. 382-01818
	ORDER

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The district court having found that payment of the $20,000 was made prior to March 23, 1982, such payment constituted a voidable preference. The appeal is therefore DISMISSED. The petition for relief from judgment is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUBREY A. FITZGERALD,) FILED APR. 5, 1984
Plaintiff-Appellee,) CA No. 83-4020
v.) DC No. CV 82-799-RE
OLIVE SORENSEN,) BKCY No. 382-01818
Defendant-Appellant.) MEMORANDUM*

Appeal from the United States District Court for the District of Oregon
James E. Redden, District Judge, Presiding
Argued and submitted March 7, 1984

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

While this appeal was pending the boat was sold. The sale did not yield sufficient proceeds to satisfy the first mortgage, so junior lienholders, including Sorensen, received nothing. The remaining question on appeal is the proper disposition of the $20,000 cash payment

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

admittedly received by Olive Sorensen from the bankrupt.

Evidence in Fitzgerald's excerpt of record suggest that the payment was made prior to March 15 and therefore prior to the granting of the mortgage on March 23. If so, the $20,000 was not a payment on the mortgage but a voidable preference. The bankruptcy court found that the $20,000 was paid "sometime in late March," which could refer to a date after March 23. Appellant's E.R. 44. We would normally examine the transcript but none was provided. The burden of furnishing it rests on the appellant, but we will not penalize Sorensen since the precise date of the payment did not become crucial until the main issue on appeal was mooted by the sale of the boat.

We remand for a factual finding of the date of the $20,000 payment. If the payment was made after March 23, the case

will return to this panel to resolve the legal issues surrounding the scope and interpretation of 11 U.S.C. Section 547. If the payment was made before March 23, it is a voidable preference.

REMANDED.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	) FILED DEC. 3, 1984
VERNON A. HARVEY and	) Bankruptcy Case No.
EVELYN K. HARVEY,	) 382-01818
Debtors,	)
AUBREY A.FITZGERALD,	) Adversary Pro. No.
Trustee,	) 82-0799
Plaintiff	)
v.	) RECOMMENDATION AND
OLIVE SORENSEN,	) PROPOSED ORDER
Defendant.	)

After a hearing on Tuesday, October 9, 1984, I find and recommend that the District Court find that the issue to be determined upon remand to the District Court has been resolved by the stipulation attached to the proposed order and that the record be returned to the Court of Appeals for disposition. The other matters raised at the hearing are beyond the scope of the order of remand.

DATED this 10th day of October, 1984.

s/
DONAL D. SULLIVAN
Bankruptcy Judge

ADOPTED this 29th day of October, 1984.

s/
JAMES A. REDDEN

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	) FILED JULY 20, 1984
VERNON A. HARVEY and	) Bankruptcy Case No.
EVELYN K. HARVEY,	) 382-01818
Debtors,	)
AUBREY A.FITZGERALD,	) Adversary Pro. No.
Trustee,	) 82-0799
Plaintiff	)
v.	) STIPULATION OF
OLIVE SORENSEN,	) FACTS UPON REMAND
Defendant.	)

The Ninth Circuit Court of Appeals has remanded the above-captioned matter to the Bankruptcy Court for a finding with respect to the date of payment of the sum of twenty thousand ($20,000) dollars from the debtor, to the defendant herein, Olive Sorensen.

The parties hereby stipulate and agree that the sum of twenty thousand ($20,000) dollars was paid by the debtors to Olive Sorensen, on or before March 15, 1982. Further, that prior to June 10, 1982 the $20,000 was completely dissipated by Olive Sorensen by her loaning $15,000 to another person on promise to repay at a future

date and paying out the remainder on account of her debts.

That at no time has Olive Sorensen consented to the jurisdiction of this Court of the adversary proceeding brought therein.

s/_____
Charles C. Erwin
Attorney for Plaintiff

s/_____
William F. White
Attorney for Defendant

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	) FILED MAY 3, 1983
VERNON A. HARVEY and	) Bankruptcy Case No.
EVELYN K. HARVEY,	) 382-01818
Debtors,	)
AUBREY A.FITZGERALD,	) Adversary Pro. No.
Trustee,	) 82-0799
Plaintiff	)
v.	) JUDGMENT
OLIVE SORENSEN,	)
Defendant.	)

Based upon separate Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED that Plaintiff, Aubrey A. Fitzgerald, trustee of the estate of Vernon A. Harvey and Evelyn K. Harvey, debtors, have judgment against defendant, Olive Sorensen, in the amount of $20,000.

IT IS FURTHER ORDERED that Defendant, Olive Sorensen, is prohibited from claims as a general creditor of the estate until such amount shall have been paid to plaintiff, Aubrey A. Fitzgerald, voluntarily or involuntarily.

DATED this 12th day of April, 1983.

s/
DONAL D. SULLIVAN
Bankruptcy Judge

ADOPTED this 4th day of April, 1983.

s/
US Dist. Court Judge

cc: Charles C. Erwin
William P. White

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	) FILED FEB. 1, 1983
VERNON A. HARVEY and	) Bankruptcy Case No.
EVELYN K. HARVEY,	) 382-01818
Debtors,	)
AUBREY A.FITZGERALD,	) Adversary Pro. No.
Trustee,	) 82-0799
Plaintiff	)
v.	) AMENDED ADVERSARY
OLIVE SORENSEN,	) COMPLAINT
Defendant.	)

Plaintiff alleges:

COUNT I
COMPLAINT TO DECLARE MORTGAGES
PREFERENTIAL

I

Jurisdiction is placed in this court under 28 USC 1481.

II

Plaintiff is the duly appointed Trustee for the estate of the debtors herein.

III

That Plaintiff is authorized to avoid preferential transfers under 11 USC 547(b), and under State Law, and made applicable by 11 USC 544.

IV

That on or about March 23, 1982, debtors did mortgage and convey a certain documented vessel, "Resless II," an asset of the estate of debtors, to the defendant herein.

V

Such transfer was made for the benefit of an insider and creditor, on account of an antecedent debt owed by debtors before transfer, when the debtors were insolvent and made within ninety (90) days of debtors' petition.

VI

Such transfer by mortgage would enable defendant to recover more than the defendant would recover as a creditor of the class of unsecured creditors.

COUNT II
COMPLAINT TO SET ASIDE, AND FOR REPAYMENT OF SUMS PAID TO DEFENDANT

VII

Plaintiff realleges Count I.

VIII

That within ninety days of the petition filing, and within one year of the petition filing the debtor paid the sum of $20,000 to the Defendant, Olive Sorensen.

IX

That this sum of $20,000 was paid directly to Olive Sorensen on and account of antecedent debt loans, which were made by Sorensen to debtors.

WHEREFORE, plaintiff prays:

1. That the mortgages alleged in Count I be set aside and held for naught, being preferential as described in this amended complaint.

2. That the payment of $20,000 be declared preferential payment on account of antecedent debt, and Plaintiff be give judgment in the sum of $20,000 against defendant Olive Sorensen.

s/----------

Charles C. Erwin
Lawrence W. Erwin
Attorneys for Trustee and Plaintiff

1471. Jurisdiction

a. Except as provided in subsection 1(b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under titled 11.

b. Nothwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

c. The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

d. Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of

justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

e. The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, or the debtor, as of the commencement of such case.

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, Counsel of Record for Petitioner, do hereby certify that I served three (3) true copies of the foregoing PETITION FOR WRIT OF CERTIORI on the following person at his last known address as set forth under his name by placing said true copies, certified by me as such, in an envelope addressed to him with postage paid and mailed the envelope to him from the U.S. Post Office at Portland, Oregon on the _____th day of May, 1985; there being regular communication by the U.S. Mail from Portland to said address:

CHARLES C. ERWIN, Esq.
Erwin & Erwin
3323 S.W. Harbor Drive
Portland, Oregon 97201

William F. White
Of Attorneys for Petitioner
and Counsel of Record

Supreme Court, U.S.
FILED
SEP 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 84 1845

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1984

OLIVE SORENSEN,

Petitioner,

v.

AUBEY A. FITZGERALD, Trustee,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The bankruptcy trustee brought suit to set aside a voidable transfer of $20,000 in cash and made by the bankrupts to their mother and made within the period described in 11 USC 547(b).

Petitioner is an initial transferee of those cash funds as described in 11 USC 550(a).

11 USC 550(a) provides that the court may require return of the precise property, or if the precise property is unavailable, the value of that property.

Petitioner contends that her voluntary conversion of $15,000 to a loan receivable, and to goods and services, make the petitioner invulnerable to the trustee's action for return of money or its value to the estate.

The trustee contends that the petitioner is liable for the money or its value, under 11 USC 547(b) and 11 USC 550(a).

REASONS THE WRIT SHOULD NOT BE GRANTED

The facts present a case of activities by the petitioner and the bankrupt which fall squarely within the circumstances of 11 USC 547(b).

The trustee brought suit to recover the money from the petitioner who is an initial transferee. Her capacity as a defendant and the trustee's suit against her fall squarely within the circumstances of 11 USC 550(a).

The courts below did nothing more than apply plainly written statutory provisions to facts clearly within the statutes' contemplation.

Argument

No construction, or discretion was exercised by an inferior court. 28 USC 1471 which gives the bankruptcy court jurisdiction over property of the debtor in cases arising under Title 11 of the United States Code, is in complete harmony with the statutory provisions of 11 USC 547(b) and 11 USC 550(a).

11 USC 547(b) and 11 USC 550(a) represent a congressional statement that preferential transfers constitute property of the debtor; these transfers are available to the estate of the debtor upon bankruptcy.

Read together, these provisions provide a method by which preferential transfers of property by the debtor are subject to retrieval by the debtor's estate. Thus, all creditors are treated fairly, and none may be preferred.

A trustee's suit under Section 547(a) and 550(b) seeks return of the debtor's assets, which petitioner held to the exclusion of other creditors.

The Writ of Certiorari should not issue since the result is in exact conformance with federal statute, and no case law is in conflict with the decision in this matter.

The cases cited by the petitioner are factually different from this matter. In none is the defendant an initial transferee of cash transferred by the debtor.

This case is <u>not</u> one where the property is in possession of "someone else." The property is in possession of petitioner. Though its form has changed, no one but the petitioner received the property and its benefits.

The district court has original and exclusive jurisdiction of all cases under Title 11, and of all civil proceedings arising under Title 11, and the bankruptcy court is given the exercise of Title 11 jurisdiction of the district courts.

The inferior courts had jurisdiction of the controversy itself. This suit arose pursuant to the provisions of 11 USC 547(b) and 11 USC 550(a).

The parties presented a controversy arising exclusively under Title 11; they did so in a civil proceeding arising exclusively under Title 11. The court had jurisdiction over the parties and to the extent necessary, that jurisdiction extends to rendering a judgment in favor of one party against another under 11 USC 550(a).

The Writ of Certiorari should not issue since the subject matter of the controversy arose exclusively under federal law, and the relief given was in compliance with 11 USC 550(a).

The Court of Appeals, below, committed no procedural error which calls for the exercise of supervisory power of this Court.

After remand on April 5, 1984, the facts of the case were stipulated and the law became plainly applicable. A reasoned decision in this case is both unnecessary and inappropriate. There is no question that the facts compelled the lower court to hold in favor of the trustee.

CONCLUSION

The Writ of Certiorari sought, should not issue:

The inferior court had jurisdiction over the $20,000 cash transfer from debtor to their mother. Property transferred by the debtor made under circumstances described in 11 USC 547(b) constitutes property of the debtor with in the meaning of 28 USC 1471.

Although the property itself had changed form from cash to a loan receivable, owned by petitioner and to goods and services, 11 USC 550(a) gives the court power to award the estate the property or its value.

The inferior court had jurisdiction over the subject matter and property because the dispute arises exclusively under Title 11; no other body of law applies.

The lower court committed no error because after remand the facts were agreed to. Those facts fall clearly

within the prohibition of 11 USC 547(b) and 11 USC 550(a). No further decision is either necessary or would such a decision in this particular case give any assistance to bench and bar.

In this case any decision by the Court of Appeals turns exclusively upon agreed facts to which the relevant federal law plainly applies.

BY _____

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APPENDIX

Page

11 USC 547(b). Preferences..... A

11 USC 550(a). Liability Of Transferee Of Avoided Transfer... C

547 PREFERENCES

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer--

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title...

550. LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USC 544, 545, 547, 548, 549, or 724(a)], the trustee may recover, for the benefit of the estate, the property tranferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; ...

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1845

In the Supreme Court of the United States

OCTOBER TERM, 1984

OLIVE SORENSEN,

Petitioner,

v.

AUBREY A. FITZGERALD, Trustee,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OLIVE SORENSEN, Petitioner, vs. AUBREY A. FITZGERALD, Trustee, Respondent.	)	No. 84-1845 PETITIONER'S REPLY BRIEF

It is too late for Respondent to shift from 11 U.S.C. #547 to #550 in order to give the bankruptcy court needed jurisdiction.

All for the want of a tangible res, Respondent-Trustee suddenly finds himself without jurisdiction for his proceeding brought under 11 U.S.C. 547. So, in desperation, he surprisingly for the first time injects 11 U.S.C. 550 into this case in an attempt to save his void judgment. It is too late as a reading and understanding of section 550 will show.

First, however, Respondent is to be commended for candidly conceding that his purpose in commencing the adversary

proceeding under 11 U.S.C. 547 was to retrieve (R.Br. p3,4) the $20,000 cash fund (R. Br. 1) which debtors had transferred to Petitioner as a preference. Since the $20,000 fund was completely dissipated by Petitioner before June 10, 1982, when the bankruptcy petition was filed, there was no specific property upon which the bankruptcy court could exercise its exclusive in rem jurisdiction under 28 U.S.C. 1471(e). Nor, did Petitioner have possession of any $20,000 fund to turn over to the trustee. Maggio v Zeitz, Trustee in Bankruptcy, 33 U.S. 56, (1948).

So now let us understand the purpose and use of Section 550. It reads:

> "550. LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER."
>
> "(a) . . . to the extent that a transfer is avoided under sections . . .547. . . of this title . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . .

> "(1) the initial transferee of such transfer . . ."
> (Underlining ours)

To begin with, 550 is not a substitute for or expansion of 547. Section 550 is intended only to authorize the court to impose personal liability upon the transferee of property after the transfer has been avoided under 547 and then only where it appears necessary or equitable to do so. It is a tool for the court and trustee to use during a proceeding. As held in In Re Cove Patio Corp.,(Bk. S.D. Fla. 1982) 19 B.R. 843 at 844:

> ". . .Section 550(a)(1) was not intended to expand the trustee's right to recover preferences as provided in #547, but was intended only to facilitate his recovery of transfers avoidable under #547. . ."

In keeping with the clear language of 550, the section can only be invoked by the bankruptcy court in exercise of its discretion. Discretion is an implied necessity. Matter of R.A. Beck Builder,

Inc., (Bk. W.D.Pa. 1983) 34 B.R. 888, 894.

Next it should be pointed out that Congress heeded the teaching of this Court in Maggio, supra, when it fashioned 550 as part of the 1978 Bankruptcy Reform Act. Congress understood the fine line separating need for in rem jurisdiction when ordering a person to turnover property and the need for in personam jurisdiction when imposing liability upon a person for failure to turnover property. As the Committee on the Judiciary noted in Senate Report No. 95-989, Section 550:

> "Section 550 prescribes the liability of a transferee of an avoided transfer, and enunciates the separation between concepts of avoiding a transfer and recovering from the transferee. . ." (11 U.S.C.A. #550)

Use of section 550 can best be described by likening it to the gear-shift in an automobile. Imagine that the trustee is driving up a hill to reach a transferee of

property and get it back for the benefit of the estate. The trustee is proceeding in the high gear of 547 only to discover he can't make the grade because the transferee has disposed of the property. At that point the trustee can ask the court to shift into low gear of 550 so he can reach the transferee and make he or her personally liable for the value of the property. The key to the gear-shift is an order of the bankruptcy court which in its discretion permits it to shift into low gear of 550 if it believes it to be necessary or equitable.

It is too late for Respondent to now ask this Court to shift gear or remand the case to the bankruptcy court so Respondent can start all over again by alleging jurisdiction under 550 instead of 547. There are several reasons:

Since the bankruptcy court avoided the transfer by its judgment entered May 3, 1983, a start all over again is barred by the one

year statute of limitations in section 550 (e) which reads:

> "550(e) An action or proceeding under this section may not be commenced after the earlier of--
>
> "(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and
>
> "(2) the time this case is closed or dismissed."

Any nunc pro tunc order to permit Respondent to return to the bankruptcy court would be repugnant to the established principle that jurisdiction of every federal court is measured at the time a plaintiff files his original complaint and upon the allegations therein.

In any event, Respondent should be estopped from claiming 550 as a jurisdictional base for his $20,000 judgment against Petitioner. The record can show that Respondent took the deposition of Petitioner before he filed his amended complaint and learned of her both receiving $20,000 in cash AND

spending it before the bankruptcy petition was filed. It should be conclusively presumed from their experience that Respondent and his two attorneys knew of the existence of 550 and its use from the very start.

Petitioner should be granted a writ and be awarded attorney fees as part of her costs.

Respondent's belated injection of section 550 into this case gives deep concern to Petitioner. However, the remainder of his responsive brief is both innocuous and irritating. It triggers a renewal of Petitioner's request for an award of attorney fees as part of her costs as made to the Court of Appeals under its Local Rules 14 and 13(b)(1)(E) and authority of Vaughan v Atkinson, 369 U.S. 527 (1962).

For most of three years Petitioner has been challenging the courts by claiming they lacked jurisdiction for not having actual or

constructive possession of a res; first as to the RESTLESS II and second as to the $20,000 cash fund. Not once did Respondent ever argue or give any reason to either the Bankruptcy Court or the U.S. District Court or even mention 11 U.S.C. 550 as a reason for jurisdiction. At all times Respondent and his two attorneys stood mute as did the able Bankruptcy Judge and the able U.S. District Judge. These muting tactics culminated in the U.S. Court of Appeals where it failed to make a "Reasoned disposition" of Petitioner's motion for relief from a void judgment (App. P.B.). Here, Petitioner has challenged the Court of Appeals for acting beyond its Article III jurisdiction. To this challenge Respondent only states on page 6 of his brief:

> ". . .A reasoned decision in this case is both unnecessary and inappropriate."

Had Respondent done his homework he would have discovered that the Court of Appeals for

the District of Columbia vacated a district court judgment because that court had denied defendant's motion to dismiss for lack of jurisdiction without explaining why it did so. In Georgiades v Martin-Trigona, 729 F.2d 831 (D.C. Cir. 1984) the Court held at page 832:

> "(1) The District Court, by fiat, denied. . . motion to dismiss for lack of the requisite amount in controversy,. . . it did not explain why it denied the motion. . . We therefore vacate the judgment."

Finally, the recalcitrance and indifference of Respondent toward Petitioner and the courts is demonstrated by Respondent not making any response whatsoever to Petitioner's contention that the Court of Appeals exceeded its Article III jurisdiction by affirming ~~it~~ the judgment instead of vacating the judgment and ordering the adversary proceeding to be dismissed without prejudice. The court's disposition is contrary to its own en banc decision in Sawyer v Pioneer Mill Co., 300 F.2d 200, (9 Cir. 1962),

certiorari denied in 371 U.S. 814.

Apparently, Respondent, acting as an official trustee of the bankruptcy court is callous and indifferent as to whether or not his judgment against Petitioner is void or that the bankruptcy court acted beyond its jurisdiction as constrained by Article III of the Constitution.

Pray grant a writ and vacate the judgment and dismiss the adverse proceedings without prejudice. An award of attorneys fees as part of costs would be most welcomed.

Respectfully submitted,

By William Farnum White

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CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, Counsel of Record for Petitioner, do hereby certify that I served three (3) true copies of the foregoing PETITIONER'S REPLY BRIEF on the following person at his last known address as set forth under his name by placing said true copies, certified by me as such, in an envelope addressed to him with postage paid and mailed the envelope to him from the U.S. Post Office at Portland, Oregon on the 1st day of October, 1985; there being regular communication by the U.S. Mail from Portland to said address:

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